

BETWEEN:



OKS
Appellant

and

10

The State of Western Australia

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Internet Publication

1. The Appellant certifies that this outline is in a form suitable for publication on the internet.

20

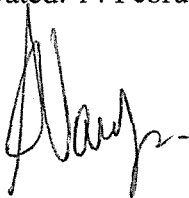
Part II: Outline of Propositions

2. The nature and effect of the erroneous direction meant that it was not possible for the Court of Appeal to be satisfied that the appellant's guilt had been proved beyond reasonable doubt, or to place any weight on the fact that jury had returned a guilty verdict in relation to count 1, and to then reach a conclusion that no substantial miscarriage of justice had occurred: AS [42].
3. As the Court of Appeal found (**CAB** 120, 135, 136, 154; **CA** [124], [181], [185], [259]), the verdict of guilty was arrived at in circumstances in which the jury were prohibited from engaging in a process of reasoning concerning the central issue at the trial, namely the complainant's credibility, a process of reasoning that was favourable to the appellant: AS [51]-[53]

30

4. When considered in context the direction impermissibly intruded on the jury's function because it required the jury to assess the complainant's credibility on the basis that the lies that they found she had told were not capable of leading to a conclusion that all of her evidence could not be relied on: AS [55]-[57].
5. Because of this, the other directions that were given by the trial Judge concerning lies told by the complainant (CAB 34-35), inconsistent statements (CAB 32-34) and the need to scrutinise the complainant's evidence with care because of the long delay in prosecuting the appellant (CAB 39-43), could not have had the effect of 'neutralising' the erroneous direction.
- 10 6. Even if the Court of Appeal correctly concluded that the evidence properly admitted at the appellant's trial proved his guilt beyond a reasonable doubt it was not open to the Court of Appeal to dismiss the appeal against conviction: AS [63].
7. As Buss P concluded, the erroneous direction 'intruded impermissibly on the function of the jury' (CAB 120; CA [124]): AS [62]. Given the existence of a fundamental division of functions in a criminal trial between the judge and the jury, and the fact that it is not the province of the judge to direct the jury not to follow a path of reasoning unless required to as a matter of law (*Azzopardi v The Queen* at [49] and [50]), such an impermissible intrusion occasioned a substantial miscarriage of justice regardless of whether the evidence properly admitted at trial proved the
20 appellants guilt beyond reasonable doubt: AS [63].

Dated: 14 February 2019



Sam Vandongen S.C.



Shash Nigam